Filed 6/15/18 P. v. Cortinas CA6
Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL CORTINAS, Defendant and Appellant.	H042043 (Santa Clara County Super. Ct. No. C1370576)

Miguel Cortinas appeals from an order denying a petition for resentencing under Proposition 47. The California Supreme Court granted review of our court's 2016 opinion affirming the trial court's order, and recently returned the case to us for reconsideration in light of *People v. Page* (2017) 3 Cal.5th 1175 (*Page*), in which the Supreme Court determined that stealing a vehicle worth $950 or less constitutes petty theft regardless of the statute under which it is charged. Convicted of felony buying or receiving a stolen vehicle (Pen. Code, § 496d), Cortinas argues in supplemental briefing filed after *Page* that violations of section 496d come within Proposition 47's resentencing provisions. He asks that we affirm the trial court's order denying his petition, without prejudice to that court's consideration of a new petition containing evidence of his eligibility for relief.

We will again affirm the trial court's order with prejudice. As we will explain, Proposition 47's reforms do not extend to violations of Penal Code section 496d.

(Undesignated statutory references are to the Penal Code.) We also reject Cortinas's equal protection argument. Even if we view Cortinas as similarly situated to a person convicted of stealing a vehicle worth $950 or less, a rational basis exists to support the differing sentencing treatment.

I. BACKGROUND

A. TRIAL COURT PROCEEDINGS

After pleading no contest to buying or receiving a stolen vehicle (§ 496d) and admitting a prior strike conviction for residential burglary (§§ 667, subds. (b)–(i); 1170.12), Cortinas was sentenced in July 2014 to 32 months in prison. In January 2015 he filed a petition under Proposition 47 requesting recall of his felony sentence and misdemeanor resentencing. In a brief supporting the petition, Cortinas argued that Proposition 47 redesignated as misdemeanors violations of section 496d when the value of the vehicle does not exceed $950. The petition contained no facts or evidence showing that the vehicle involved (a 1992 Honda Accord) was valued at $950 or less.

At a hearing on the petition, counsel for Cortinas stated: "I have submitted a brief about the eligibility of 496d of the Penal Code. [¶] I'm prepared to submit it on the arguments in that brief." The prosecutor argued that violations of section 496d do not come within Proposition 47, and even if they did, the Honda Accord was valued "well over $950." The prosecutor added that "the latest Blue Book shows that the vehicle is worth in the range of $1,300 to $2,100." In denying the petition, the trial court expressed the view that offenses under section 496d are not subject to the provisions of Proposition 47. The trial court also noted that the vehicle appeared to have a value greater than $950.

B. CORTINAS'S INITIAL CONTENTIONS

Cortinas argued in his opening brief that the trial court erred by concluding that Proposition 47 did not apply to a conviction under section 496d for buying or receiving a

stolen vehicle, and by considering evidence outside of the record of conviction (the Blue Book value of a 1992 Honda Accord). He argued in the alternative that trial counsel rendered ineffective assistance by failing to object to the Blue Book value offered by the prosecutor. In an opinion filed in February 2016, we affirmed the trial court's order without addressing whether a violation of section 496d involving a vehicle valued at $950 or less came within Proposition 47's resentencing provision. We concluded that Cortinas, having the burden to prove his eligibility for Proposition 47 resentencing, had failed to cite any facts or offer any evidence of the vehicle's value. We rejected the ineffective assistance claim, citing *People v. Sherow* (2015) 239 Cal.App.4th 875, 880 (*Sherow*) (trial court may consider evidence outside the record of conviction when determining eligibility for relief under Proposition 47) and *People v. Mitcham* (1992) 1 Cal.4th 1027, 1080 (counsel's "failure to make a meritless objection does not constitute deficient performance").

The California Supreme Court granted Cortinas's petition for review of our 2016 opinion, deferred the matter pending its decision in *Page*, and recently returned the matter to us for reconsideration in light of *Page*.

II. DISCUSSION

The voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, in 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*Id*. at p. 1091.) Section 1170.18, added by Proposition 47, "creates a process where persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing." (*Sherow*, *supra*, 239 Cal.App.4th at p. 879.) "A defendant seeking

resentencing under section 1170.18 bears the burden of establishing his or her eligibility, including by providing in the petition a statement of personally known facts necessary to eligibility." (*Page, supra,* 3 Cal.5th at p. 1188.)

Section 1170.18 specifies that a person may petition for resentencing in accordance with certain sections of the Health and Safety Code and the Penal Code, including section 490.2 (added by Proposition 47 designating theft of property not exceeding $950 as misdemeanor petty theft) and section 496 (amended by Proposition 47 designating buying or receiving stolen property valued at $950 or less as a misdemeanor). (§ 1170.18, subd. (a).) The Supreme Court held in *Page* that a person convicted of automobile theft under Vehicle Code section 10851 is eligible for resentencing under Proposition 47 if the vehicle value is $950 or less, because "obtaining an automobile worth $950 or less by theft constitutes petty theft under section 490.2, and is punishable as a misdemeanor regardless of the statutory section under which the theft was charged." (*Page, supra,* 3 Cal.5th at p. 1187.) The court in *Page* reasoned that Proposition 47's new petty theft provision (§ 490.2) applies to theft offenses under Vehicle Code section 10851 (which was not amended) because "section 490.2, subdivision (a) mandates misdemeanor punishment for a defendant who 'obtain[ed] any property by theft' where the property is worth no more than $950," and "[a]n automobile is personal property." (*Id*. at p. 1183.)

A. CONVICTIONS UNDER PENAL CODE SECTION 496d

Defendant argues that the reasoning in *Page* extends to convictions for buying or receiving a stolen vehicle under section 496d. Section 496d, which makes it unlawful for any person to buy or receive a motor vehicle, special construction equipment, trailers, and vessels, was not amended by Proposition 47. Section 496, addressing stolen property generally, was amended by Proposition 47 to mandate misdemeanor punishment for an eligible defendant "who buys or receives any property that has been stolen" if the value

of the property does not exceed $950. (§ 496, subd. (a).) Applying the reasoning of *Page*, Cortinas argues, the reference to "any property" in section 496, subdivision (a) must extend to automobiles notwithstanding section 496d.

The receiving stolen property statute amended by Proposition 47 is structurally different from the newly enacted petty theft statute examined in *Page*. New section 490.2 begins with the phrase "Notwithstanding Section 487 or any other provision of law defining grand theft[.]" Given that broad language, "a person serving a sentence under Penal Code section 487 or another statute expressly defining a form of grand theft (e.g., Pen. Code, §§ 484e, 487a, 487i) is clearly eligible for resentencing under section 1170.18 if he or she can provide the value of the property taken was $950 or less." (*Page*, *supra*, 3 Cal. 5th at p. 1182.) There is no equivalent prefatory language in section 496 serving to redesignate other offenses proscribing receipt of stolen property—e.g., section 496a (certain materials owned by railroad, utility, or public entity), section 496b (books belonging to a college or library), and section 496d (stolen vehicles)—and we will not construe section 496 as to render those statutes superfluous. (*City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th 707, 724.)

We also reject the argument Cortinas advanced in his original briefing that the electorate intended to include section 496d among those offenses eligible for resentencing under Proposition 47. That argument was rejected in *People v. Varner* (2016) 3 Cal.App.5th 360, review granted Nov. 22, 2016 and dism. Aug. 9, 2017, S237679 (*Varner*).[1] The court in *Varner* reasoned that the prefatory language in

[1] The Supreme Court deferred briefing in *Varner*, and held the case pending consideration and disposition of *People v. Romanowski* (2017) 2 Cal.5th 903. The court dismissed *Varner* after issuing *Romanowski*, in which it concluded that section 490.2's "unqualified references to 'obtaining any property by theft' and 'any … provision of law defining grand theft' encompass theft of access card information" proscribed by section 484e, subdivision (d). (*Romanowski*, at p. 910.) The dismissal of the petition for review in *Varner* suggests that section 496d offenses are not theft offenses coming under

section 490.2 showed the drafters of Proposition 47 knew how to reclassify a category of offenses without identifying every statutory violation. (*Varner*, at p. 367.) Section 496d was not expressly amended by Proposition 47, and the amendment to section 496 contains no language showing an intent to reclassify section 496d offenses based on the value of the stolen vehicle. (*Varner*, at p. 367.) Construing section 496 "to include section 496d would be inconsistent with our Supreme Court's determination that we may not 'add to the statute or rewrite it to conform to some assumed intent not apparent from that language.' " (*Varner*, at pp. 366–367.)

Nor will we construe section 490.2 as encompassing receiving stolen vehicles under section 496d. Section 490.2 proscribes "obtaining any property by theft," while section 496d proscribes buying or receiving a car that has already been stolen. The person buying or receiving the stolen vehicle does not obtain the vehicle by theft. Indeed, if the drafters of Proposition 47 intended section 490.2 to apply to receiving stolen property offenses, it would have been unnecessary to amend section 496. (*Varner*, *supra*, 3 Cal.App.5th at p. 367, review granted and dism.)

We recognize that the First District Court of Appeal, Division Four, recently concluded that "[a] conviction for receiving a stolen vehicle is obtaining property by theft and qualifies for resentencing" under Proposition 47, citing *Page* and *Romanowski*. (*People v. Williams* (2018) 23 Cal.App.5th 641, 644.) In our view, the *Williams* court's reliance on *Page* and *Romanowski* is misplaced. As we have explained, *Page* and *Romanowski* addressed whether certain *theft* offenses come within section 490.2 for resentencing purposes under Proposition 47. Neither suggests that resentencing under section 490.2 extends to offenses that do not constitute thievery.

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section 490.2, as the defendant in *Varner* argued. *Varner* was not held for *Page*, which was argued and decided soon after *Varner* was dismissed. *Page* also involved the reach of section 490.2, and does not undermine the conclusion in *Varner*.

B. EQUAL PROTECTION

An equal protection violation is shown when "the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) Cortinas argues that a person who buys or receives a stolen car (valued at $950 or less) in violation of section 496d is similarly situated to a person who steals the same car in violation of section 490.2, yet they are treated differently: The car thief will be sentenced to a misdemeanor, while the person who buys or receives the stolen car will face a harsher sentence. In a similar vein, he contrasts the punishment for buying or receiving a stolen car under section 496b with the punishment under section 496 for buying or receiving stolen property (other than a vehicle) valued under $950.

Even assuming the 1992 Honda Accord is valued at $950 or less and that Cortinas is similarly situated to persons convicted of stealing a car of the same value or of misdemeanor buying or receiving stolen property other than a vehicle,[2] his equal protection claim fails. Given that a defendant does not have a fundamental interest in a specific term of imprisonment or in the designation of a particular crime, an equal protection challenge involving an alleged sentencing disparity is subject to rational basis review. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) In applying the rational basis test, " 'a court may engage in " 'rational speculation' " as to the justifications for the legislative choice.' " (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881.) "To mount a successful rational basis challenge, a party must ' "negative every conceivable basis" ' that might support the disputed statutory disparity." (*Ibid.*) "If a

[2] Compare *People v. Gutierrez* (2016) 245 Cal.App.4th 393, 403–404 ("persons convicted of different crimes are not similarly situated for equal protection purposes") with *People v. Noyan* (2014) 232 Cal.App.4th 657, 667 (statutory proscriptions against bringing different types of contraband into jails are sufficiently similar under equal protection).

plausible basis exists for the disparity, courts may not second-guess its ' "wisdom, fairness, or logic." ' " (*Ibid*.)

The statutory proscriptions against buying or receiving stolen property are "directed at those who knowingly deal with thieves and with their stolen goods after the theft has been committed." (*People v. Tatum* (1962) 209 Cal.App.2d 179, 183, abrogated by statute on another ground as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1165.) Section 496 "is directed at the traditional 'fence' and at those who lurk in the background of criminal ways in order to provide the thieves with a market or depository for their loot." (*People v Tatum*, at p. 183.) "[B]y cutting off the 'fence' a major obstacle is placed in the path of encouraging thefts as a profitable venture." (*Id*. at p. 184.) It is therefore not irrational to treat those who incentivize theft differently from those who engage in the thievery.

It is also rational to distinguish stolen property offenses based on the type of property stolen. Unlike other forms of stolen property, vehicles are relied upon for daily living—for transportation to work, school, and other commitments, and for obtaining basic necessities. The market for stolen cars supports chop shops and vehicle theft rings. In enacting section 496d, the Legislature recognized "the *business* of vehicle theft," and sought to "provide[] safer streets and save[] Californians millions of dollars." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2390 (1997–1998 Reg. Sess.) as amended June 23, 1998. Italics added.) Consequently, the electorate reasonably could distinguish between sections 496 and 496d in adopting Proposition 47, and not extend misdemeanor treatment to the latter.

III. DISPOSITION

The order denying Cortinas's resentencing petition is affirmed.

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Grover, J.

I CONCUR:

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Bamattre-Manoukian, J.

GREENWOOD, P.J., Dissenting

I respectfully dissent. I agree with the rationale set forth in *People v. Williams* (2018) 23 Cal.App.5th 641 (*Williams*), that Penal Code section 496d falls within the resentencing provisions of Proposition 47, and would thus allow appellant Miguel Cortinas to return to the trial court to make his case that the value of the property he received was less than $950 in value.[1]

In *Williams*, the trial court denied defendant's petition for resentencing finding that a conviction for receiving a stolen vehicle under section 496d did not come within the provisions of section 1170.18. The First District Court of Appeal, Division Four, reversed the trial court, finding that "although section 1170.18 does not expressly reference section 496d, it does permit resentencing under section 490.2 for 'obtaining any property by theft' valued at less than $950. A conviction for receiving a stolen vehicle is obtaining property by theft and qualifies for resentencing." (*Williams*, *supra*, 23 Cal.App.5th at p. 644.)

In finding that section 496d qualifies for resentencing under section 1170.18, the *Williams* court followed the reasoning of our Supreme Court, which has now twice held that the failure to enumerate an offense in section 1170.18 does not preclude qualification for resentencing where the prior conviction involved obtaining property by theft under section 490.2. In *People v. Romanowski* (2017) 2 Cal.5th 903, 910 (*Romanowski*), the high court found that section 484e, theft of access card information, is a crime of "obtaining property by theft" thus placing it within the definition of section 490.2. In *People v. Page* (2017) 3 Cal.5th 1175, the Supreme Court applied a similar analysis to Vehicle Code section 10851, finding that where a defendant can demonstrate that he or

[1] All further citations are to the Penal Code unless otherwise specified.

she took a car valued at less than $950 with the intent to permanently deprive the owner of that personal property, the defendant is eligible for resentencing under Proposition 47.

In *Williams*, the court noted that section 496d is a theft statute like section 484e, falling within the chapter of the Penal Code entitled "Larceny." (*Williams, supra*, 23 Cal.App.5th at p. 649.) Applying the logic of *Romanowski*, the court found that "[b]uying and receiving a stolen item is analogous to acquiring or retaining stolen access card information" and that both statutes involve obtaining property by theft, the prerequisite to qualification for resentencing under section 1170.18 when section 490.2 is implicated. (*Williams*, at p. 650.)

As amended under Proposition 47, section 496, receiving stolen property, also provides for resentencing if the value of the property received is under $950. Because that section does not reference section 496d, the majority reasons that the relief afforded by 1170.18 is not intended to apply to appellant Cortinas. Additionally, the majority believes that it is reasonable to distinguish between those who deal in stolen property from those who steal the property itself, as well as to distinguish between types of stolen property in determining whether individuals qualify for resentencing under section 1170.18.

The reasoning of the court in *Williams* is more persuasive to me. It does not seem that there is a real basis to distinguish between a person who commits a violation of Vehicle Code section 10851 by stealing a car, thus "obtaining property by theft" under section 490.2, and one who commits a violation of section 496d by receiving that stolen car, also "obtaining property by theft" under section 490.2. "Relying on the reasoning in *Romanowski*, we see no reason to assume that a reasonable voter would conclude that receipt of a stolen vehicle worth less than $950 is a serious and violent crime outside the reach of Proposition 47 when receipt of any other form of stolen property is not. [Citation.]" (*Williams, supra*, 23 Cal.App.5th at p. 649.)

The *Williams* court reversed in part because "the overarching purpose of Proposition 47 [is] to reduce penalties for certain crimes and concomitantly to save costs to the state, where it is also determined by the court that reducing the crime and accompanying sentence will not create an unreasonable risk of danger to public safety." (*Williams, supra*, 23 Cal.App.5th at p. 650.) Moreover, "Proposition 47 directed that the text of the initiative 'shall be broadly construed to accomplish its purposes' and 'shall be liberally construed to effectuate its purposes.' (Voter Information Guide [Gen. Elec. (Nov. 4, 2014)], text of Prop. 47, §§ 15, 18, p. 74.)." (*Romanowski, supra,* 2 Cal.5th at p. 909.) The court's decision in *Williams* appropriately implements the initiative's purpose in accord with the recent decisions of the Supreme Court.

Accordingly, I would reverse the judgment and direct the trial court to consider Cortinas' eligibility for resentencing under Proposition 47.

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GREENWOOD, P.J.